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Ideas & Trends

PRIVACY

No good reason for employer to ask for candidate's password

In 2009, two employers ventured into what was otherwise uncharted territory by requesting Facebook passwords from job seekers. It is only recently, however, that the issue has taken center stage as the trend involving employers requesting Facebook passwords from job seekers is growing. In fact, two senators have since requested that the Department of Justice investigate this practice.

The contention, according to labor and employment attorney, Andrew Gould, a partner with the law firm Wick, Phillips, Gould & Martin, LLP is that certain employers, in their efforts to ensure they are hiring qualified candidates, seek this information to see what's "under the hood," so to speak. Employers, according to these reports, are requesting passwords, asking candidates to log on to their Facebook page in the employer's presence, or "friending" candidates simply to investigate further.

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limits in the context of most employment decision, about a candidate or employee.

As for its legality, various states provide common law privacy protections for their residents. There are also statutes, including the Federal Stored Communications Act, which regulate accessing another's electronically-stored communication without authorization. Whether requiring an individual to provide access to their Facebook page as a condition of employment constitutes sufficient authorization or coercion is unclear.

Beyond the legality of the practice, Gould says the question is why would employers even want access to such non-public, likely personal, information? It is one thing to peruse someone's publicly-available profile page to get a snapshot of a candidate's judgment or discretion, but is quite another to probe into the

If you are one of these employers, says Gould, know that the practice may be on the fringe of legality. More importantly, except for certain high security and/or government positions, it is difficult to see what benefit there is to learning more information, likely personal and off-

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"It is one thing to peruse someone's publicly-available profile page to get a snapshot of a candidate's judgment or discretion, but is quite another to probe into the private affairs of a candidate."

private affairs of a candidate. If in your candidate interview process, you generally inquire into a candidate's personal life, something that except in very limited circumstances is per se unlawful, then this point will be lost on you, Gould continues. For everyone else, know that there are many laws restricting an employer's actions towards candidates and employees based on protected characteristics (*e.g.*, disabilities, religious beliefs, political affiliations, sexual orientation, etc.). One of the best defenses to claims of discrimination by a candidate is to not know the information in the first place, emphasized Gould.

Curious employers who wish to learn about candidates already have numerous tools available to them — among them, interviews, reference checks, personality and drug tests (subject to applicable law), and credit checks. Beyond that, Gould says you would be well-advised to think through probing before probing further. ■